Cultural Repercussion on Mediation: Exploring A Culturally Resonant Mediation Approach Germane to Asia

*Jamila A. Chowdhury**

Abstract

Cultures always have profound impacts on what people do, and more importantly how they do it. The practice of mediation is not an exception. Therefore, a dynamic mediator also endeavours to mitigate 'cultural conflict' in a dispute so that cultural departure does not exacerbate or create another conflict. Adapting Hofstede's theory on 'style of dispute resolution practices in Asian commercial organizations' into mediation, this paper explains why a bit of an evaluative approach from mediators would be more appreciated and fruitful in Asian cultural context. Practices of mediation in indigenous Asian societies are also analyzed to deduce that historically Asian people are accustomed with practicing evaluative mediation to resolve their disputes. In brief, theories and practices of mediation synthesized in this paper would assist puzzled practitioners and policy makers in Asia to choose between evaluative and facilitative mediation. This paper, however, forms a strong argument why practice of evaluative mediation would be more productive and apposite in Asian context.

I. INTRODUCTION

Mediation is essentially an assisted conflict resolution process where parties need to negotiate with each other, with the assistance of a third party mediator, to attain a better outcome. A mediator, therefore, needs to be conscious about factors which may hinder effective negotiation between mediating parties.[1] Mediators need to understand conflict – how it arises and evolves in interpersonal relationship requiring mediation. Conflict is a state of antagonistic human relationship that may begin from a difference of opinion. As explained by Simpson[2] a conflict may arise because of opposing views on three different issues: material assets, psychological needs for control or recognition, and conflict divergence of value. Conflict may also be evident in different spheres. While intra-personal conflict is a person's disharmony with his or her own morality, inter-personal conflict is between two people, intra-group conflict is between group members

* Associate Professor, Department of Law, University of Dhaka, Bangladesh. email: *jamilachowdhury@du.ac.bd*

1 J.A.Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2012, p. 13.

2 C. Simpson, *Coping through Conflict Resolution and Peer Mediation,* The Rosen Publishing Group, New York,1998, p. 2.

while inter-group conflicts are between groups. Therefore, differentiation itself may be the cause of inter-personal or family conflict.[3] According to Nichols & Schwartz:[4]

> *The goal of Bowen's therapy became the differentiation of self of key family members, so they could help the whole family differentiate. This emphasis on differentiation, meaning control of reason over emotion, betrays Bowen's psychoanalytic roots.*

Though Bowen[5] developed this concept from a family relationship perspective, it is equally applicable in other inter-personal conflicts. Thus, the level of differentiation of each person's *"self," "full-self,"* or *"half-self"* is an important factor in mitigating or accelerating conflict. When a person's ability is esteemed with "full-self" (i.e. a self-esteem vigour with capability and separateness independent from the feelings of others), in contrast to "half-self" (i.e. a *"symbiotic relationship"* when *"one feels angry and upset, the other becomes equally upset and angry"*), he or she will have an advantageous position in mediation. However, whether the conflict in mediation accelerates or mitigates due to a person's differentiation depends on the level of such differentiation. In other words, if both parties in mediation are of "full-selves," the conflict will be much higher when either or both parties are of "half-selves".[6] Since mediation is an empowering process,[7] a dynamic mediator tries to take a holistic approach by combining the concept of differentiation and conflict so that half-self parties will be empowered and differentiated in this process and conflict will not be escalated.

Further, culture always has a profound impact on what people do, and more importantly how they do it. The practice of mediation is not an exception. Therefore, a dynamic mediator also endeavours to mitigate 'cultural conflict' in a dispute so that cultural departure does not exacerbate or create another conflict. An intervention by a mediator mitigating the cultural conflict *"at the right time and in the right way can speed the process of de-escalation"*.[8] Though mediation, along with different other non-adversarial dispute resolution mechanisms, is widely used in different developed and developing countries, still the approach or mode of mediation that might be used to provide better justice to its recipients is a widely debated issue among scholars around the globe.

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3 Heather K Alvarez, "Applying Family Systems Therapy in Schools", in R. W. Christnerand R.B. Mennuti (eds.), *School Based Mental Health: A Practitioner's Guide to Comparative Practices*, Routledge, New York, 2009, p. 255.

4 M. P. Nichols and R. C. Schwartz, *Family Therapy: Concepts and Methods*, 5th ed., Allen and Bacon, Boston, 2000, p. 123.

5 M. Bowen, *Family Therapy in Clinical Practices*, J. Aronson, New York, 1978.

6 A. Taylor, *The Handbook of Family Dispute Resolution: Mediation Theory and Practice*,Jossey-Bass, San Francisco, 2002, p. 35-37.

7 Albie M. Davis and Richard A. Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes", *Mediation Quarterly*, 1984, Vol. 6, No. 4, pp. 17-26, 18-19. See also, David Neumann, "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce", *Mediation Quarterly,*1992, Vol. 9, No. 3, pp. 227-39, 231-32.

8 A. Taylor, n 6, p. 65.

Western scholars consider mediation as a process of dispute resolution where two parties negotiate to find a consensual outcome with the help of a neutral and impartial third party mediator who merely facilitates the process and not beyond that.[9] Such Western-fashioned '*facilitative mediation'* fosters greater cooperation among parties to resolve their disputes, without any primary concern about the content.[10] According to the definition of facilitative mediation, mediators should not make deterministic statements about "what should or should not" be done by either of the parties to avoid the dispute. However, as indicated earlier, the nature of assistance that a mediator may provide to its parties is still a debated issue, because the nature of assistance provided by mediators in Western society cannot be unswervingly adopted in other Asian countries. Rather, it should be carefully handled due to the cultural variations in different jurisdictions.[11] This paper, therefore, endeavour to explore a culturally resonant mediation technique to Asia. With this objective in mind, this paper provides firstly a brief explanation of Asian culture and how it affects the dispute resolution mechanisms followed in different Asian countries. Accordingly, by defining culture, cultural root, and cultural values, the following section demonstrates how ingrained cultural values may affect the nature of mediation. Based on this cultural background and its predicted impact on mediation, the next section explains how the high-power distance culture creates an expectation of mediators' evaluative intervention among disputing parties attending mediation. This theoretical underpinning is then matched with historical trend and current practice of *'evaluative mediation'* in different Asian countries including China, India, Singapore, Malaysia, Japan. Finally, this paper concludes with a view that people generally do not deviate much from their core cultural values and carry on their cultural values over time and space.

II. CULTURE, CULTURAL ROOT, CULTURAL VALUES AND THEIR IMPACT ON APPROACHES TO MEDIATION

Culture can be defined as a set of values or principles commonly shared by people living in a society. Peterson[12] defined cultural values as *"principles or qualities that a group of people will tend to see as good or right or worthwhile."* Though cultural practices may be polar opposites in two or more cultures, they are still appropriate in their own

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9 A. Stitt, *Mediation: A practical guide*, Cavendish Publishing, London, 2004. See also, Kimberlee K. Kovach and Lela P. Love, '"Evaluative'" Mediation is an Oxymoron", *Alternatives to High Cost Litigation*, Vol. 14, 1996, pp. 31-32.

10 G. Tillett and B. French, *Resolving Conflict: A Practical Approach*. Oxford University Press, Oxford, 2006. See also, National Alternative Dispute Resolution Advisory Council (NADRAC), *Terminology: A Discussion Paper,* National Alternative Dispute Resolution Advisory Council, Canberra:,2002. See more, R. Fisher, William Ury and Bruce Patton, *Getting to Yes - Negotiating an Agreement without Giving in*, 2nd ed., Penguin, New York, 1991.

11 R.W.Christnerand M.R. Mennuti (eds)., *School-Based Mental Health: A Practitioner's Guide to Comparative Practice*, Routledge, New York. See also, D. W. Augsberger, *Conflict Mediation across Cultures: Pathways and Patterns*, John Knox Press, Kentucky, 1992. See more, A. Taylor, n 6.

12 B. Peterson, *Cultural Intelligence: A Guide to Working with People from other Cultures*. Intercultural Press, Yarmouth,2004, p. 22.

context.[13] For example, the United States may be considered a country of *"masculine culture"* that makes a clear distinction between male and female, while Sweden may be distinguished for its *"feminine culture"*.[14] We may have a special preference for a specific type of culture, but we may not make a judgement on whether another culture is good or bad. A clear distinction between *"preference"* and *"judgement"* has been demonstrated by Jennifer Nedelsky.[15] As she describes it, we may express our preference by saying *"I like this painting"*; however, we are expressing our judgement when we say *"This is a great painting."* Though there could be thousands of sub-cultures within a culture, it is still possible to generalize cultural values.[16] Further, people from any particular culture may not always behave according to their cultural values. Such values, however, are reflected through the repeated behaviours made by individuals over a long period of time.[17]

As explained by Peterson:[18]

> *There are exceptions to every rule, but generalisation that come from research and from the insight of informed international cultural experts and professionals allows us to paint a fairly accurate picture of how people in a given country are likely (but never guaranteed) to operate.*

However, identification of cultural roots may not be immediately forthcoming as considerable debate exists on whether cultural values change over time. While modernisation theorists such as Karl Marx and Daniel Bell argue that cultural values change with the socio-economic development of a society, cultural theorists such as Max Weber and Samuel Huntington claim that cultural values cast an enduring and autonomous influence over societies.[19] Though paradoxical, it is possible that cultural values may change yet remain inherently identical over time. As expressed by Peterson:[20]

> *The trunk and basic form of the tree remain essentially the same over the years, but the leaves change colour every season and are replaced every year … In spite of these changes, though, a willow is always a willow and a redwood remains a redwood.*

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13 P. Rack, *Race, Culture and Mental Disorder*, J.W. Arrowsmith Ltd., Bristol, 1983.

14 Ben Shaw-Ching Liu, Olivier Furrer and D. Sudharshan, *Journal of Service Research*, Vol. 4, No. 2, 2001, pp. 118-129, 122.

15 Jennifer Nedelsky, "Embodied Diversity and Challenges to Law", *McGill Law Journal,* Vol. 42, 1997, pp. 91-117, p. 107.

16 B. Peterson, n 12, p. 23. See also, J. T. Wood, *Communication in Our Lives*. Wadsworth Cengage Learning, Boston, 2011.

17 Jerzy J. Smoliczand Margaret J. Secombe, "Sociology as a Science of Culture: Linguistic Pluralism in Australia and Belarus" in E. B. Rafael (ed.), *Sociology and Ideology,* Brill, Leiden, 2003, p. 56.

18 B. Peterson, n 12, p. 27.

19 R. Inglehart and C. Welzel, *Modernization, Cultural Change, and Democracy: The Human Development sequence*, Cambridge University Press, Cambridge, 2005.

20 B. Peterson, n 12, p. 28.

To differentiate the part of culture that remains static over time from the other part that accepts changes, Peterson[21] introduced the concept of *"big C-culture"* and *"small c-culture"*. Peterson[22] also explained that in every part of a culture, either big or small, only a fraction is visible like the tip of an ice-berg and the rest remain hidden. As culture has both core and mixed parts, every piece of behaviour of an individual may not be explainable readily by his/her culture. Therefore, to understand the cultural root we need to concentrate on Big C-culture because Small c-culture may change over time as people from any particular culture interact with people or knowledge from other cultures.

Table 1: Cultural paradigm

	Big C-culture	**Small c-culture**
Invisible culture	***Example:*** Core values, attitudes or beliefs, society's norms, legal foundations, assumptions, history, cognitive process.	***Example:*** Popular issues, opinions, viewpoints, performances or tastes, certain knowledge (trivia, facts).
Visible culture	***Example:*** Historic architecture, geography, classical literature, presidents or political figures, classical music.	***Example:*** Gestures, body posture, use of space, clothing style, food, hobbies, music, artwork.

Source: Adopted from B. Peterson, Cultural Intelligence: A Guide to Working with People from other Cultures. Intercultural Press, Yarmouth, 2004, p. 25.

It is better to have an understanding about cultural values because *"if [we] can adjust [our] own behaviours to dovetail with [others], [we] are much more likely to find comfortable, compatible, and fruitful ways of working together"*.[23] As mediators have to work closely with parties to a dispute, the same argument also applies to mediation. Further, to suggest a more congruent approach of mediation for any given culture, it is required to identify the cultural root, not its branches. Identifying the root is important because *"[b]behaviour that [we] see is a branch; the roots, the part [we] don't see make the branch what it is"*.[24]

Culture may bring an important component into mediation. The culture of dispute resolution affects the mode of mediation.[25] If a mediator is not aware of the culture of the parties, it is possible that he/she may act so as to, or do something which may, create a cultural shock to the disputing party or parties and ultimately make negotiation difficult. Thus, a mediator also needs to be aware of the meaning of culturally located

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21 B. Peterson, n 12, p. 28.
22 B. Peterson, n 12, p. 28.
23 B. Peterson, n 12 , p. 24.
24 R. R. Thomas, *Beyond Race and Gender: Unleashing the Power of Your Total Work.,* AMACOM, New York, 1992, p. 51.
25 J. Adamopoulos and Y.Kashima, *Social Psychology and Cultural Context*, Sage, Thousand Oaks, 1999.

responses which parties may make during mediation. Response of parties to negotiation and mediation may vary according to culture, and if a mediator cannot appropriately recognize and interpret such responses, it may create confusion.[26] Bouleehas defined three different contrasting types of culture which may have significance on choosing effective negotiation strategies.[27] These are:

- Individualistic culture vs. collective culture;
- Egalitarian culture vs. hierarchical culture ; and
- Low-context culture vs. high-context culture

While Western society can be considered as a more individualistic, egalitarian and low-context culture, Asian cultures can be termed as collective, hierarchical and high-context culture.[28] In an individualistic Western society, people are more focused on individual benefit and social benefits receive only secondary interest. Therefore, a negotiator may not get any extra benefit by showing a social benefit during negotiation, if his/her counterpart is from a Western culture. However, substantial benefit in negotiation may be attained by offering a more socially acceptable solution when his/her counterpart in negotiation is from an Eastern or Asian culture. Similarly, as Western values are more egalitarian or based on equal right to all people depending on their age, sex, or employment status, a negotiator may not expect to get any advantage of his/her greater age in comparison to the age of his/her counterpart. However, in Asian culture, age or employment status might add some extra value to the arguments given by a person during negotiation.

Furthermore, in a low-context Western culture, people place more value on what is said than the context. Therefore, in a western culture 'silence' may be considered as a sign of evasiveness. However, in a high-context culture, more emphasis is given on the 'context' of a dispute. In an Asian culture, silence may signify a shame which may not be discussed with others, or fear of retaliation. Therefore, knowing this cultural difference is very important when negotiators come from different cultures. Without having such understanding, one may misinterpret the non-verbal signals generated by others, or some of their verbal claims may be counterproductive because of different cultural orientation.

In a related vein, anthropologist Edward Hall distinguished between high-context and low-context cultures, and understanding such differences in cultures is important for a mediator.[29] In high-context (Eastern) cultures such as Japan, Korea, China, people

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26 L. Boulle, *Mediation: Principles, Process, Practice,* 3rd ed.,Butterworths, Sydney, 2011, p. 133.
27 L. Boulle, n 26, p. 133.
28 M. C. Pryles, *Dispute Resolution in Asia,* Kluwer Law International, Bedfordshire, 2006.
29 L. A. Samovar, R. E. Porter, and E. R. Mc. Daniel, *Intercultural Communication: A Reader*, 13th ed., Wadsworth, Boston, 2012.

may not express all their feelings and emotions through words, and inference, gesture, or even silence may have a specific cultural meaning which warrants a culturally specific response.[30] In low-context (Western) cultures such as Australia, Canada, Germany, Scandinavia and North America, most interaction is expressed verbally and very little is embedded in the context or explained through body language.[31] High-context cultures are motivated by the principles of *"indirectness as part of the forms of politeness"* and *"shared values of esteem for others."* The approach of low-context cultures is direct, as indirectness is thought of as cowardly and lacking in self-esteem,[32] and principled negotiation is conducted by separating people from the problem.[33] However, in high-context cultures, people and problems are deemed to be interrelated and thus inseparable. According to Augsberger:[34]

> *The low-context cultures tend to view the world in analytic, linear, logical terms that allow them to be hard on problems but soft on people, focused on instrumental outcomes but easy on affective issues; while high-context cultures perceive the world in synthetic, spiral logic that links the conflict event and its impact, issue, actors, content, and context.*

Therefore, a cultural understanding is important for a mediator to comprehend the desire, anger and emotion of parties attending mediation, particularly in a high-context culture. It is also important to understand how much authoritative and evaluative approach a mediator may apply in resolving disputes among parties from different cultural backgrounds. Pertinently, as discussed later in this paper, considering the cultural expectation on mediation, Western concept of facilitative mediation and the neutrality of mediators may not fit well in Asia. As observed by Boullee,[35] "*In many cultural contexts, neutrality might be neither a recognized nor a desirable attribute for mediators*". Rather, some advisory or evaluative role of mediators is appreciated. For example, as identified by Palmer:[36]

> *The Chinese mediator does not merely act as a channel of communication between the disputants; he is expected to propose possible solutions, to explain the framework of law within which the agreement must be reached, and to take an important part in the parties' negotiations*.

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30 L.A.Samovar, R. E. Porter, and E. R. Mc. Daniel, n 29.

31 L.A.Samovar, R. E. Porter, and E. R. Mc. Daniel, n 29.

32 A. Taylor, n 6.

33 F. Strasser, and P. Randolph, *Mediation a Psychological Insight into Conflict Resolution*, Cronwell Press Ltd., London, 2004.

34 D. W. Augsberger, *Conflict Mediation across Cultures: Pathways and Patterns*, John Knox Press, Kentucky,1992, p. 91.

35 L. Boulle, n 26, p. 79.

36 Michael Palmer, "The Revival of Mediation in the People's Republic of China", in W. E. Butler (ed.),*Yearbook on Socialist Legal Systems: 1987*, Transnational Publishers, Inc., New York,1988, p. 244.

III. CULTURAL REPURCUSSION IN PEOPLE'S EXPECTATION FROM MEDIATION IN ASIA

The impact of culture on mediation can be better understood from a study made by Hofstede.[37]Although Hofstede in his study showed cultural impact to explain dispute resolution approaches used in resolving commercial disputes, the result of his study can also be replicated to understand the cultural impact on mediation in resolving other civil disputes. In analyzing the impact of culture on approaches to dispute settlement, a distinction between high-power-distance culture and low-power-distance culture has been suggested by Hofstede.[38] According to Hofstede,[39] high-power-distance and low-power-distance culture are parallel with the high-context and low-context culture mentioned above. However, a distinction made on the basis of power-distance or hierarchy has a greater implication for mediation and other forms of dispute resolution modelled under different cultural contexts.For instance, as observed by Macduff:[40]

> *In low-power-distance cultures, there is a greater degree of flexibility, mobility and ambiguity in relationship and status, matched by more direct communication and the avoidance of verbal, communicative ambiguity: directness and avoidance of ambiguity reflect the pattern of low-context communication in which the meaning is almost wholly contained in the words; and*
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> *In high-power-distance cultures, the reverse applies; there is less ambiguity in roles, states and hierarchy, matched by a higher degree of willingness and need to use ambiguity in communication: hence the indirect style of high-context communication. Apparent communicative ambiguity reflects the high-context expectation that meaning will be understood.*

The distinction between high-power-distance and low-power-distance culture has special significance for the role of a third party involved in a dispute resolution process. As observed by Adamopoulos and Kashima,[41] disputants in high-power-distance cultures place more reliance on high-authoritative third party intervention in resolving their disputes, than on their own negotiation capabilities. In most of the disputes, there could be an *"asymmetry of influence"*.[42] While in a low-power-distance culture, it is expected that such asymmetry in dispute resolution would be removed by facilitating equal participation and agency of the disputants, in a high-power-distance culture such asymmetry is accepted by the disputants as a *'normative feature'* of their engagement. As observed by Macduff:[43]

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37 G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations,* SAGE, Thousand Oaks, 2001.

38 G. Hofstede, n 37.

39 See Hofstede, above n 37.

40 Ian Macduff, "Decision making and Commitments: Impact of Power Distance in Mediation", in J.Lee, and HweeTeh (eds.), *An Asian Perspective on Mediation,* Academy Publishing, Singapore,2009, pp. 111-44, 115.

41 J. Adamopoulos and Y.Kashima, n 25.

42 Ian Macduff, n 40, p. 124.

43 Ian Macduff, n 40, p. 124.

> *Inequality of relationship and decision-making authority in negotiation counterparts is not likely to be mitigated merely through the adoption of a set of process norms that, for example, assume or seek to create equality of participation and voice in any transaction.*

Therefore, a more interventionist role of a mediator remains a cultural expectation from the parties in Asian countries attending mediation. Discussions made so far indicate that high-context Asian countries such as China Thailand, Malaysia and India also possess high-power-distance cultures in which mediators historically command higher value in the society and use social and cultural norms to make their evaluations during mediation.[44] On the other hand, mediators from low-context Western countries such as the USA and Australia, place more emphasis on *'facilitative mediation'* and *'strict neutrality'* on their part, rather than on their own evaluation or active intervention in disputes.[45]

Table 2: Power Distance Index (PDI)

Asian Countries	PDI value	Western Countries	PDI value
Malaysia	104	France	68
Philippines	94	Belgium	65
China	90	Italy	50
Indonesia	78	USA	40
India	77	Australia	36
Singapore	74	Germany	35
Thailand	64	United Kingdom	35
Japan	54	New Zealand	22

Source: adopted from G. Hofstede, Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations, SAGE, Thousand Oaks, 2001, p.89

As shown in the Table 2, countries in the Asia including Malaysia, the Philippines, China and Indonesia have higher PDI values in comparison to their Western counterparts such as the United States, the United Kingdom, New Zealand and Australia. Therefore, it is expected that mediators from Malaysia or Indonesia would not be as neutral as mediators

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44 Richard Cohen, "Mediation Standards", *Australasian Dispute Resolution Journal,* Vol. 6, No. 1, 1995, pp. 25-32. See also, B. G. Chen, *Law without Lawyers, Justice without Courts: on Traditional Chinese Mediation,* Ashgate, 2002; See also, K. Siddiqui, *Local Government in Bangladesh,* The University Press Limited, Dhaka, 2005.

45 Susan Douglas, "Neutrality in Mediation: A Study of Mediator Perceptions", *Queensland University of Technology Law and Justice Journal*, Vol. 8, No. 1,2008, pp. 139-157; See more, Leda M. Cooks, and Claudia L. Hale, "The Construction of Ethics in Mediation", *Mediation Quarterly,* Vol. 12, 1994, pp. 55-76; Leah Wing, "Wither Neutrality? Mediation in the 21st Century", in M. A. Trujillo, L. J. Myers, P. M. Richards, and B. Roy (eds.),*Re-Centering Culture and Knowledge in Conflict Resolution Practice,* Syracuse University Press, New York, 2008.

from Australia, and would bring in more evaluation during mediation. For instance, as explained by Wall and Callister[46] while defining Malaysian community mediation, *"the ketua kempung [village head man] usually talked to each party separately, listened to each, and suggested some concessions or relocations."* The same strategy is currently being followed by mediators in the Malaysian Mediation Centre (MMC). "*The mediator is authorized to conduct joint and separate meetings with the parties and to suggest opinions for settlement"*.[47] Similarly, respected people in China, Thailand, Malaysia, and India have been serving for many centuries as mediators and settling local disputes according to social norms and cultural values. Therefore, as demonstrated in the next section of this paper, use of evaluation by mediators remains a cultural expectation by disputing parties attending mediation from Asian societies.

Following the cultural context of Asia discussed above, Suvanpanich[48] in Thailand, Boo[49] in Singapore, and Chowdhury[50] in Bangladesh all observed the need for an advisory role of mediators in their respective cultural contexts. An advisory or evaluative role is generally applied to the content of a dispute. An evaluative role means that advice is given, or comment is made, from a mediator about what should or should not be done, or what could be done to avoid conflict when one party is legally obliged to pay to the other, or advising the other party on what to do to resolve the dispute. An evaluative mediation is a dispute resolution process where a third party mediator takes an interventionist role, controls the process of mediation and may also provide his /her evaluation on the content of a dispute and advises parties regarding alternative available remedies and probable court outcomes. *However, evaluative mediators do not determine the outcome for the parties and let parties determine it for themselves*. Such an advisory role may be practiced even by in-court mediators.[51] In many cases, such an advisory or evaluative role is played under the shadow of a law.[52]

It is argued by many Western scholars that an advisory role or an evaluative role of mediators affects the process of self-determination and the parties' autonomy in mediation. For many western scholars, evaluative mediation is said to be *'bad mediation'* or, in fact, not mediation at all.[53] Professor Lela has said explicitly that evaluative mediation is 'bad' and should be *'discouraged or prohibited'*.[54]For Lela and Kovach, as well as many others,

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46 James A. Wall, and Rhonda R. Callister, "Malaysian Community Mediation", *Journal of Conflict Resolution,* Vol. 43, No. 3,1999, pp. 343-65, 344.

47 Sharifah. S. Ahmad and Rajasingham Roy,"The Malaysian Legal System, Legal Practice and Legal Education", IDE Asian Law Series, No. 4,2001, p. 47.

48 Thawatchai Suvanpanich, "Thailand", in M. Pryles, (ed.), *Dispute Resolution in Asia,* Kulwer Law International, Netherlands,1997, pp. 261-292.

49 Lawrence Boo, "Singapore", in M. Pryles, (ed.), *Dispute Resolution in Asia,* Kulwer Law International, Netherlands, 1997, pp. 207-250.

50 J. A. Chowdhury, *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?,*Unpublished PhD thesis, University of Sydney, Sydney, 2011.

51 J. A. Chowdhury, n 50. See also, Lawrence Boo, n 49.

52 J. A. Chowdhury, n 50.

53 James J. Alfini, "Evaluative Versus Facilitative Mediation: A Discussion", *Florida State University Law Review*, Vol. 24, 1996-97, pp. 919-35, 927.

54 Kimberlee K. Kovach and Lela P. Love, n 9.

only facilitative mediation can be considered as *'pure mediation'*.[55] However, if these criticisms of evaluative mediation are directly transferred from western culture to eastern culture, irrespective of cultural variations between two societies, such transportation may fail to achieve desired result of mediation in that society.[56] Further, evaluative roles by mediators do not exclude parties from taking an active part in discussion, developing options for settlement and controlling the final outcome.[57] Rather, sometimes such an evaluative role helps to attain some *"higher good"*.[58]

Therefore, an evaluative mode of mediation, contrary to the facilitative mode of mediation in Western societies, may allow Asian mediators to provide advice which would help parties to reach an informed and a mutually favourable solution. Evaluative role of mediators may also be applied in other multi-cultural developed countries like Australia or USA. For instance, while explaining a mediator's advisory role The National Mediator Accreditation Scheme (NMAS)[59] of Australia states:

Some mediators may also use a blended process that involves mediation and incorporates an advisory component, or a process that involves the provision of expert information and advice, where it enhances the decision-making of the participants provided that the participants agree that such advice can be provided. Such process may be defined as … "evaluative mediation."

This evaluative process of mediation is sometimes termed as *"substance-oriented mediation"*.[60] In a substance-oriented mediation, *"the mediator is often an authority figure who evaluates the case based on experience and offers recommendations on how the case should be resolved."* Therefore, for the purpose of this paper, the culturally resonant mediation in Eastern countries, especially Asian countries, refers to an *'evaluative mediation'* as opposed to *'facilitative mediation'* that is practices in Western countries. The rationale and importance of the practice of evaluative mediation in Asian countries, however, are ingrained in their cultural contexts as discussed in the following section, that is to say, historically high power distance Asian countries are following evaluative mediation in resolving their disputes.

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55 James J. Alfini, n 19, p. 929. See also, Donna Cooper and Rachael Field, "The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner", *Queensland University of Technology Law and Justice Journal,* Vol. 8, No. 1, 2008, pp. 158-75; See more, N. Alexander, *Global Trends in Mediation*, 2nd ed., Kluwer Law International, Hague, 2006.

56 J. Tomlinson, *Cultural Imperialism: A Critical Introduction,* Continuum, London, 1991.

57 Donna Cooper and Rachael Field, n 55. See more, Nadja Alexander, n 55.

58 A. Taylor, "Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process", *Mediation Quarterly*, Vol. 14, No. 3, pp. 215-36, 1997, p. 222.

59 National Mediator Accreditation System (NMAS), *Practice Standard,* Federal Court of Australia, Sydney, 2007.

60 T.Sourdin, *Alternative Dispute Resolution,* 3rd ed., Law Book Co., Pyrmont, NSW, 2008, p. 54.

IV. APPROACHES OF MEDIATION IN ASIA: A HISTORICAL UNDERPINNING TOWARDS INDIGENOUS CULTURE OF EVALUATIVE MEDIATION

As discussed above, the big C culture does not change over time, while the small c culture or the surface of culture may change with economic development and other institutional arrangements. Further, the power distance character of a society depends on its big C culture. Therefore, this section demonstrates that Asian countries with high power distance are actually following their indigenous practice of evaluative mediation that is also an indication of high power distance society. Societies of high power distance also demonstrate more cohesion to collective interest, respect to social hierarchy, and high context attitude. As Asian culture is characterized as collective, hierarchical and high-context culture, the evaluative approach in mediation under elderly or socially honorable mediators would be much appreciated here.The theoretical understanding on impact of culture on mediation can be verified by analyzing the historical practice of mediation in different Asian countries. As expected by the theory of cultural impact on mediation, different high-power distance Asian countries adhere to evaluative mediation as discussed below:

A. *Mediation in the People's Republic of China*

Chinese mediation has developed from a unique historical social and cultural background that promotes the Confucian philosophy of maintaining peace and harmony in a society. Mediation in the People's Republic of China (PRC) promotes socials values of selflessness and promotion of social harmony rather than individualism and personal justice promoted by the West.[61] The PRC has a long history of community mediation. While it is not possible to pin-point the time period in which the practice of mediation started in the PRC, a rich practice of community mediation can be found in Confucianism. The lesson of Confucius (551–479 B.C.) is to forgive, tolerate, and cooperate with others rather than making complaints. More pertinently, one should "persuade" the other person to get his or her cooperation. In short, Confucianism highly values compromise and persuasion, as well as the intermediary who was able to secure them[62]. The success of Chinese mediation largely lies on this principle of social harmony. As observed by Triandis:[63]

> *In a society where harmony is the ideal and "doing the right thing" is essential for good relations, one often does what one believes to be socially desirable even if one's attitudes are inconsistent with the action*.

Following its rich culture of mediation, in the PRC during the nineteenth century the unofficial mediators tended to dominate the dispute-resolution arenas, settling disputes

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61 Wenshan Jia, "Chinese Mediation and Its Cultural Foundation", in G-M Chen and R. Ma (eds.), *Chinese Conflict Management and Resolution,* Ablex Publishing, Westport,2002, pp. 289-295.

62 Richard Cohen, n 44; See also, B. G. Chen, n 44.

63 Harry C. Triandis, "The Self and Social Behavior in Different Cultural Contexts", *Psychology Review*, Vol. 96, 1989, pp. 269–89, 80.

within families, clans, and villages.[64] The disputes were taken to a formal authority only when informal mediation failed. However, community mediation in the PRC became more institutionalized after the Chinese revolution in 1949. In 1954, People's Mediation Committees (PMC) were formed in almost every neighbourhood of the PRC, and comrades from the Chinese Communist Party were involved in PMCs to resolve local disputes. It is argued that the PMCs' resolutions of disputes are not only based on local values but also reflect party policies.[65]

There are about one million mediators in the PRC[66]—about one for every one thousand people. As indicated by Ren,[67] the number of mediators per 100 people of the PRC exceeds the number of judges per 100 people in the USA. This indicates a great commitment to the practice of community mediation in the PRC. As observed by Jia,[68] in contrast to USA mediators, the Chinese mediators' knowledge about disputants is a major asset which enables them to determine who is right or wrong in a dispute. To a Chinese mediator, the major goals are eliminating the dispute and defusing anger. No one expects the mediator to be neutral, and most mediators and citizens think that the mediator's determination on who is correct simply expedites resolution of the dispute. Unlike mediators in the West, Chinese mediators do not wait for the parties to initiate the process. Rather, they promptly find and insinuate themselves into the dispute before positions become harden.[69]

In addition to community mediation, the PRC also has a practice of court-connected mediation. According to Articles 85 and 87 of the *Civil Procedure Law* (1991)of the PRC, courts invite parties to resolve their disputes through mediation. Though participation in mediation is voluntary, any agreement reached through this process becomes as legally binding as court judgements.[70] The PRC also has a practice of mediation in international trade disputes. In these situations, parties may attend mediation under mutually agreed rules or procedures before attending trial or arbitration. Any agreement reached through mediation is considered as private contract between the parties.[71] In August 2010, legislators in the PRC first considered a law to provide a legal basis to community mediation. *It recognised the PMC as a legal authority to resolve community disputes and specified its legal structure.*[72] By doing so, the PMC got formal authority

64 Philip C. C. Huang , "Divorce Law Practices and the Origins, Myths, and Realities of Judicial 'Mediation' in China", *Modern China*, Vol. 31, No. 2, 2005, pp. 151 – 203.

65 Philip C. C. Huang, n 64, p. 715.

66 G. M. Laden, "While Mediation is Wide-Spread in China, Trade with West Calls for New DR Methods, *ADR Report*, No. 2, 1988, pp. 398-400.

67 R. Xin, "*Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China*", Westport, Connecticut, Greenwood Press 1997.

68 Wenshan Jia, n 61.

69 Wenshan Jia, n 61; See more, B. G. Chen, n 44.

70 Michael J. Moser, "Peoples Republic of China", in M.Pryles (ed.), *Dispute Resolution in Asia*, Kulwer Law International, London,1997, p.81.

71 Michael J. Moser,n 70, p. 82.

72 Liew Carol, "Recent Developments in Mediation in East Asia"in A.Ingen-Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Vol. II, Kluwer Law International BV, The Netherlands, 2011, pp. 515-557, 532.

to conduct mediation under the purview of the People's Mediation Law (PML) of the PRC. According to this law, PMCs are formed to resolve local disputes. According to Article 17 of the PML, parties have autonomy to accept or reject the invitation to attend mediation and, according to Article 21 of PML, *"in the process of mediating disputes among the people, people's mediators shall stick to principles, make legal reasoning and do justice to the parties concerned."* Therefore, the practice of mediation is evaluative though participation remains voluntary.

B. *Mediation in Thailand*

Like mediation in the People's Republic of China, mediation in Thailand is also a part of the indigenous culture where people used to submit their dispute to the respected elderly people of their society.[73] As indicated by Limparangsri and Yuprasert,[74] mediation was even practiced in Thailand 700 years ago during the era of King *Ramkamhang* who used to act as mediator to resolve disputes among his subjects. However, mediation in Thai society was practiced without an institutional mandate and without specific rules or guidelines.[75] In traditional Thai mediation, initially the mediator tried to attain a consensual decision between parties, and if this failed, mediators provided their evaluation on the dispute. Though mediators' evaluation was not binding upon parties, they usually abided by it to avoid social sanction.[76] Moreover, according to Section 850 of the *Civil and Commercial Code of Thailand* (BE 2468), a mediation agreement would be binding upon parties if they wrote a document outlining their compromise agreement and signed it.[77] To illustrate the evaluative nature of Thai mediation and its acceptance in Thai culture, Pryles[78] explained:

> *In earlier times, disputing parties would submit their dispute to an elder person whom both parties respected ... The method by which the elder person would resolve a dispute was very simple. Simple negotiation was usually tried first. If the parties could not resolve their problem, the elder person would make the decision ... At present, though Thai society has changed dramatically, such a method of resolving disputes is still prevalent.*

Despite the sporadic practice of mediation in Thai society over centuries, it was not until the beginning of 1990s when an increased number of caseloads in Thai courts, followed by a financial crisis, made the policy makers think about mediation as a cost effective alternative for litigation.[79] In 1994, mediation was first introduced in Thai Civil Courts

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73 Thawatchai Suvanpanich, n 48.

74 SorawitLimparangsri, and PrachyaYuprasert, "Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective", paper presented in *The ASEAN Law Association 25th Anniversary Commemorative Session*, Manila, 2005, 24-27 November.

75 Sorawit Limparangsri, and PrachyaYuprasert, n 74

76 Thawatchai Suvanpanich, n 48.

77 Thawatchai Suvanpanich, n 48.

78 M. C. Pryles, *Dispute Resolution in Asia.* Kulwer Law International, Bedfordshire, 2006, p. 431.

79 Sorawit Limparangsri, and PrachyaYuprasert, n 74.

under the slogan *"convenient, quick, economical and fair"*. Under this scheme, judges were encouraged to resolve cases at the pre-trial stage.[80] To facilitate court-annexed mediation during trial, further amendment was made in the *Civil Procedure Code* of Thailand in 1999. This amendment allowed Thai judges to appoint third party mediators at any stage of a trial and also to conduct *caucus* to resolve cases through mediation (Section 183). All civil court proceedings in Thailand need to be conducted in public. However, before the enactment of this amendment, there was confusion as to whether judges could hold *caucus* to conduct court-annexed mediation once a trial begins.[81]

In a court-annexed mediation, judges in Thai civil courts try to create an informal environment by holding the mediation session outside the courtroom, by not wearing gowns, and by serving drinks.[82] Further, the historical mediation practice has an influence on the mode of mediation practiced by judges in court-annexed mediation. As stated by Suvanpanich:[83]

> *The civil court has guidelines for judges who act as mediators. For example, they have to read a case accurately and seek the real need of both parties and ascertain a satisfactory resolution which may lead the parties to end their case.*

Therefore, from the practice of mediation in both in- court and out-of-court, it can be reasonably concluded that a practice of evaluative mediation persists in that society.

C. *Mediation in Malaysia*

Malaysia has a tandem court system, one secular and the other Islamic. At the top of the secular system,it has nine-member supreme court, and the subordinate courts consist of the sessions court, magistrates court, and native court. As in most legal systems, these courts branch out to lower courts in the criminal and civil system. In addition to these secular courts, there are separate Islamic or *kadi* courts that have jurisdiction over Muslims but only on cases related to Islamic law. Further, that Malaysia has three primary groups/ cultures: Malays, Indians, and Chinese. The Chinese tend to live in large cities, whereas the Malays and Indians are not as heavily concentrated in urban areas. Some live in the cities; others, in the villages.

As is revealed in other countries of Asia, Malaysia has a rich culture of community dispute resolution in their villages. Since the 1600s or earlier,[84] each village has been administered by a *ketua kampung* (i.e., village head man). This leader, almost always a

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80 Thawatchai Suvanpanich, n 48.

81 Sorawit Limparangsri, and PrachyaYuprasert, n 74.

82 Thawatchai Suvanpanich, n 48.

83 Thawatchai Suvanpanich, n 48, p. 274.

84 Lim LanYuan, 2003, *"Mediation Styles and Approaches in Asian Culture"*, paper presented at the Asia Pacific Mediation Forum,<http://www.asiapacificmediationforum.org/resources/2003/limlanyuan. pdf>.Site accessed on 5.10.2014.

male, is responsible, directly and indirectly, for a large number of municipal activities such as interactions with higher authorities, housing, road maintenance, utilities, law enforcement, and so on. Also, as in many village societies[85] one of his responsibilities is to handle disputes that are brought to him. As already mentioned the *ketua kampung* usually talked to each party separately, listened to each, and suggested some concessions or reallocations. If this failed, he would, in turn, ask each disputant to demonstrate respect for the leader's relationship with the other by following the leader's suggestions. He then made several suggestions; the disputants would agree to cease quarreling and attend a feast together at the *ketua kampung's* house. Besides *ketua kampung*, sometimes *Imams* of village mosque who conducts religious ceremonies, runs the mosque, and in general directs religious affairs in the village, also mediates disputes brought to him.

However, not all different types of issues are mediated by every mediator. As observed by Wall and Callister,[86] among the four different types of disputes: (a) agricultural, (b) community (non-agricultural), (c) husband-wife, and (d) family (other than husband-wife), the first two categories are mostly resolved by *ketua kampung* whereas the last two categories are mostly dealt with by *Imams*. Though this division of mediating different types of disputes is categorized between *Ketua kampung* and *Imam,* it is not strictly maintained rather their jurisdictions are overlapping with each other to some extent.

Table 3: Type of disputes taken to *Ketua kampung* and *Imam*

	Number of disputes	
Type of dispute	Ketua kampung	Imam
Agriculture	29	2
Community	82	9
Husband-wife	8	27
Family (other than husband wife)	8	14

Source: Wall J.A. & Callister R.R. (1999), Malaysian community mediation, Journal of Conflict Resolution, vol. 43(3), pp. 343, 350.

Mediators devote significant time and effort to meeting with the parties; specifically, they meet separately with the disputants, meet with them together, or bring them together for a meeting. In these separate and joint meetings, the mediators listen to the disputants' points of view, gather information from them, and turn to outsiders-third parties for information. Concomitant with and subsequent to the meetings and data gathering, the

[85] Sally E. Merry, "Mediation in Non-industrialized Societies" in K. Kressel and D. G. Pruitt (eds.),*Mediation Research*, Jossey-Bass, San Francisco, 1989, pp. 68-90.

[86] J.A.Wall and R.R.Callister, "Malaysian Community Mediation", *Journal of Conflict of Resolution*, Vol. 43, No.3, 1999, pp. 343-365

mediators present one disputant's point of view to the other. Having set this base, the mediators turn to a wide variety of techniques. There was frequent reliance on third parties; to attend meetings, to provide information, to provide assistance to the disputants, and less frequently to suggest how the disputants should behave and the specific concessions they should make.

D. *Mediation in India*

From time immemorial, various forms of informal justice systems prevailed in the Indian sub-continent and have been governed by the religious and cultural norms of the society.[87] It is said that the "villages' self-governance is as old as the villages themselves".[88] Rig Vedas, the oldest Hindu religious script, dating from 1200 BC, mentions the existence of village self-governance in India. Some historical basis for the resolution of disputes by the heads of neighbourhoods is also found in the work of Sen[89] who claims the existence of dispute resolution at the village level during the period of the *Dharmashastra* (Hindu religious mandate). At that time, the terms *Panchayet*, later *Shalish*, were used to indicate informal justice systems that were very similar to current day concept of evaluative mediation.[90]

It is generally assumed that this kind of local government was the basic form of government until the sixth century BC when large kingdoms began to emerge and the role of local government become subject to the central authority.[91] During 1500 BC to 1206 AD, when Hindu rulers governed the sub-continent, the king was considered the "fountain of justice" and was the highest authority in the Court of Appeal in the state.[92] Government officials ran other courts and tribunals to administer justice under the authority of a king,[93] but the central authority left local people to resolve civil and petty criminal matters through their local village councils, i.e. *panchayets*.[94] Village *panchayets* were made up of a council of village headmen, the composition of which varied depending on the economic and social structure of the villages being governed. As noted by Siddiqui,[95] *panchayets* resolved different forms of disputes. Sometimes they were formed to ensure that the members of a caste adhered to the religious and social norms of their caste and to settle disputes among members. *Panchayets* also maintained public order and inter-caste relationships among the villagers. Additionally, *panchayets*

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87 K. Siddiqui, n 44; See more, Mustafa Kamal, "Introducing ADR in Bangladesh: Practical model", paper presented in the seminar on *Alternative Dispute Resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh*. Dhaka, 2002, 31 October.

88 K. Siddiqui, n 44, p. 29.

89 Amartya K. Sen, "Family and Food: Sex Bias in Poverty", in A. K. Sen(ed.),*Resources, Values and Development,* Basil Blackwell, Oxford.

90 J. A. Chowdhury, n 1.

91 K. Siddiqui, n 44.

92 M. A. Halim, *The Legal System of Bangladesh.* 3rd ed., CCB Foundation, Dhaka,2008, p. 36.

93 M. A. Halim, n 92.

94 K. Siddiqui, n. 44.

95 K. Siddiqui, n. 44.

served to resolve labour disputes, such as those among servants and farmers or among the servants of different farmers. Village *panchayets* were also responsible for resolving civil disputes within the area.[96] As *panchayets* were the local bodies for resolving disputes among people in a locality, justice administered by this indigenous system was very much influenced by the custom and religion of that locality. As Siddiqui[97] observed:

> *Custom and religion made the panchayets so important that they often had an almost sacred status—although they could hardly be described as unbiased and objective. The panchayets never made their decisions by voting, but by a "consensuses" arrived at by the upper caste members of the panchayet, and this was generally accepted by the lower castes. This method well suited the purpose of the conservative village leadership, which wanted to maintain the status quo in society*.

Because of the high impact of customs and religions on the decision of *panchayet/ shalish*, these qualities are often found in present day evaluative mediation. Further, the effectiveness of *panchayet* can be seen in the words of Jain:[98]

These panchayets fulfilled the judicial functions very effectively and it is only rarely that their decisions gave dissatisfaction to the village people. The members of the panchayets were deterred from committing an injustice by fear of public opinion in whose midst they lived.

According to Islam,[99] *"the panchayet served civil and policing functions, coordinating rent given etc., while the shalish was a village Sabha or council that was called on to settle moral and ethical issues."* Therefore, *shalish* can be perceived as a variation of *panchayet* that resolved civil issues among local habitants. The term *shalish* is derived from the Arabic word *shalish* meaning "three." It conveys the sense of "middle"—middle man—the third party in a conflict resolution. In traditional villages, *shalish* was generally conducted by a group of the village people, including village headmen and other local elites. Whatever the variation of the terms *panchayets /shalishs*, *t*he central government body did not interfere with the decisions even when they contravened the central administrative laws, and no appeal could be made against their decisions.

The glorious history of the system of *panchayets /shalishs* during the *Mughal* period (1526 AD–1756 AD), however, was drastically curtailed by the advent of the British in the sub-continent. The East India Company started to intervene in the administration of

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96 G. S. Rahman ,*Bangladesher Ainer Itihash* [Legal History of Bangladesh], Dhaka, 1997. See also, Nusrat Ameen, "Dispensing Justice to the Poor: The Village Court, Arbitration Council *vis-a-vis* NGO", *The Dhaka University Studies Part F,* pp. 103-22.

97 K. Siddiqui, n 44, p.33.

98 M. P. Jain, *Outline of Indian Legal History.* Tripathy, Bombay, p. 61.

99 F. Islam,*TheMadaripurModel of Mediation: A new dimension in the field of dispute resolution in rural Bangladesh.* Dhaka: unpublished research paper, p. 22.

justice in British India under a Royal Charter in 1726.[100] Later, with the decline in *Mughal* rule, the East India Company controlled the administration of the Bengal province. Initially, the company adopted a new *Zamindari* system to administer justice by curbing the authority of the deep-rooted indigenous *panchayet* system.[101] However, the *Zamindari* system proved inefficient as the *Zamindars*(landlords) were usually biased, oppressive and concerned with profit (Jain 1999, 31). Realising the importance of the long-adopted *panchayet* system, the British revived this indigenous system of administering justice by promulgating the *Chowkidari Act1870*. Though the village *panchayet* system was revived as *Chowkidari Panchayet* under the *Chowkidari Act 1870*, it remained mostly unpopular.[102] After the independence of India in 1947, many *Naya*(New) *Panchayets* were formed all over India under its constitutional mandate.[103]

In addition to community mediation, the possibility of mediation of court intervention in civil cases settled outside the court was introduced through Section 89[104] of the *Code of Civil Procedure (Amendment) Act 1999 (*Act No. XXXXVI of 1999). It was not until an amendment of the Code, namely the *Code of Civil Procedure (Amendment) Act 2002* (Act XXII of 2002) that the court-connected mediation was incorporated in Indian courts. The first initiative was taken through a pilot project at the *Hazari* Court complex in Delhi in August 2005 to train judges to provide judicial mediation at their chambers (Liew 2011, 539). Further, the Delhi Mediation Centre (DMC) was established at the *Hazari*Court complex in October 2005. Though the *Civil Procedure (Amendment) Code 2002* did not provide a definition of mediation, as referred by the DMC, explaining mediation in CPC, Justice Sharma adopted a definition given by International Labour Organisation as follows:

Mediation may be regarded as a half way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of

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100 M. A. Halim, n 92.

101 K. Siddiqui, n 44.

102 P. Datta,and C. Datta,"The Panchayet System in West Bengal", in Ganapathy Palanithurai, *Dynamics of New Panchayet Raj System in India,* Concept Publishing Company, Palanithurai, 2002.

103 Arvind K. Sinha, *Panchayet Raj and Empowerment of Women,* Northern Book Centre, New Delhi.

104 Section 89 dealt with settlement of disputes outside the Court. It runs: *"(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-(a) arbitration; (b) conciliation (c) judicial settlement including settlement through LokAdalat; or (d) mediation. (2) Where a dispute had been referred (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act. (b) to LokAdalat, the court shall refer the same to the LokAdalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the LokAdalat; (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a LokAdalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a LokAdalat under the provisions of that Act; (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

conciliation but in addition is prepared and expected to make his own formal proposals or recommendations which the family court judge may be accepted.

Following the success of the pilot programme at the *Hazari* Court, judicial mediation was initiated and another mediation centre was established at *Karkardooma* Court complex in December 2005 and May 2006 respectively. By June 30, 2010, more than 28,000 cases of a different nature were referred to DMC that attained a success rate ranging from 60 to 79 per cent during the same period.

E. *Mediation in Bangladesh*

Though Bangladesh emerged as an independent country in 1971, it got its legacy from the British ruled Indian sub-continent. As described under traditional dispute resolution system in India, the traditional system of dispute resolution in Bangladesh through village *shalish* is also following the evaluative mode of mediation. Sometime it is more authoritative and comprises far more directive roles from third party mediators. Like India, the history of *panchayet*/*shalish* also plays a pivotal role in governing informal and traditional dispute resolution system in this region. It is already indicated that the practice of evaluation in a traditional dispute resolution system in the form of *panchayet*/*shalish* was a common phenomenon in this region. It is not a recent phenomenon in Bangladeshi culture, rather a customary practice of the informal justice system that has a history of more than thousand years.[105] Thus, it is not unlikely that the evaluative nature of traditional dispute resolution system conducted in out-of-court settings also might have some influence on our current-day practice of court-annexed mediation in Bangladesh. The justification of practising evaluative/directive mediation in court-connected mediation can be observed in the words of Hasan,[106] the former Chief Justice of Bangladesh:

We found that for the present, pure mediation in every case is not really suitable for our legal system. It took many years for the USA to reach the present stage through trial and error. Our experience is only a few months old. Slowly it dawned on us that instead of pure mediation if it is combined with a little bit of directive method, to which our judges, lawyers and litigants are familiar with, the judges would be more successful in their efforts.

Due to historical coherence towards evaluative/directive type of mediation, the approach of mediation being practiced in Bangladesh is not facilitative; rather, it is an evaluative mode of mediation conducted under the shadow of law. In this mode, mediators are directive. They make their evaluation on the content of a dispute and guide the outcome towards a standard that is embedded in law. Chowdhury demonstrated that the reason that mediation in Bangladesh appears to be protective of women's rights is not just that mediators are being directive or using an *evaluative* style, it is that they are

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105 K. Siddiqui, n 44; See also, Mustafa Kamal, above n 83.

106 K. M. Hasan, "A Report on Mediation in the Family courts: Bangladesh Experience", paper presented at the *25th Anniversary Conference of the Family Courts of Australia*, Sydney, 2001, 26-29 July, p. 14.

insisting that the norms and values used in the mediation are those that derive from the law and which gives women legal rights.[107]

F. *Mediation in Other Asian Countries*

Mediation in Singapore

Singapore is an inhabitance of people from China, Malaysia and India. The indigenous mediation practice of Singapore, therefore, reflects the mediation culture of these three countries discussed above. Historically, community mediation in Singapore was conducted by Chinese clan leaders, headman in Malay villages and *panchayets* in Indian communities residing in Singapore. However, the modernization process introduced with the economic progress in 1960 also had some impact on its traditional dispute resolution system. System of dispute resolution got more formal shape and formal and institutional mediation was introduced in Singapore.[108] In 1994, Singapore introduced mediation in their court system and establishes mediation centres to reduce case loads in subordinate courts. In 1997, the first commercial mediation center- Singapore Mediation Center (SMC) was established in Singapore. Following this milestone progress in institutional mediation, the Community Mediation Centers (CMC) Act was passed in Singapore to resolve community disputes through out-of-court mediation. Under this CMC Act, community mediation centers are resolving neighborhood and family disputes through mediation. Though these CMCs were formed in a more formal way, it tries to preserve the *Kampong ketua* system where village elders performed mediation to promote community cohesion.[109] To continue with their indigenous system of mediation under the influence of elder community leaders recently Singapore has introduced a "*Persuader Scheme*". Under this scheme, grassroots mediators or selected community leaders visit residence of disputed parties who refuses to attempt community mediation rather attempt to approach police for assistance.[110] It indicates that, despite their enormous economic development, endogenous approach to community mediation under persuasion still continues.

Mediation in Indonesia

Traditionally, *Musyawarch Mufakat* or '*dialog to reach consensus*' is being used in Indonesia to resolve community disputes. It is a kind of negotiation by which disputing parties initially try to resolve their disputes by themselves. If for any reason the negotiation effort fails to resolve the dispute, the dispute is referred to a respected or elderly person of the community who hear from both parties and provide his/her evaluation. It is a kind of conciliation or mediation that is traditionally being practiced in Indonesia to resolve their

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[107] J. A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*,2012.Cambridge Scholars Publishing, Newcastle upon Tyne.

[108] Goh Joon Seng (2003), "*Mediation in Singapore: the law and practice"*, Workshop 4: Arbitration and Mediation in ASEAN: The Law & Practice, ASEAN Law <http://www.aseanlawassociation.org/docs/w4_sing2.pdf>. Site accessed on 30.04.15.

[109] Gloria Lim (2003) *"Community mediation in Singapore*", paper presented at the 2nd Asia-Pacific Mediation Forum, Singapore, <http://www.asiapacificmediationforum.org/resources/2003/glim.pdf>. Site accessed on 30.04.15.

community disputes. This mechanism of *musyawarah*or indigenous system of dispute resolution plays a vital role in settling disputes or conflicts among the society members in Indonesia. As observed by Barnes (2007) this dispute resolution mechanism is used to resolve both private and public disputes. Recently, this *"musyawarah has gained acknowledgement from the community"* due to a declined confidence in court system to provide quicker resolution of disputes and also because *"all disputants share ideas in the process"*. Therefore, despite their move to modern judicial system, the indigenous evaluative system of dispute resolution still prevails in and preserved by Indonesian community.

Mediation in Hong Kong

Traditional mediation in Hong Kong followed the tradition of Chinese mediation system. However, due to a long period of western colony in Hong Kong, the modern mediation practice in Hong Kong grows under western fashioned facilitative mode. For instance, according to Hong Kong Mediation Accreditation Association Limited, mediation is a voluntary, confidential, non-binding, private dispute resolution process in which a neutral person, (i.e. the mediator), helps the parties to reach their own negotiated settlement agreement. The mediator has no power to impose a settlement. Mediator's function is to overcome any impasse and encourage the parties to reach an amicable settlement. Therefore, despite its cultural root in Chinese culture, the current day mediation practice cannot be strictly adhered to its root. Therefore, the present days institutional practice may also be taken as a point of exception in this analysis.

In addition to the countries discussed above, other Asian countries like the Philippines,[111] Sri Lanka,[112] Japan, Pakistan and Afghanistan are also following an evaluative practice in their community dispute resolution. Therefore, while designing mediation rules we may not ignore community practice.

V. CONCLUSION

The discussion so far on development and historical perspectives of mediation in Asia indicates that Asian culture view the *"people and the problem as inseparable and*

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[110] Gloria Lim, n 109.

[111] Despite centuries of colonial oppression, indigenous dispute resolution process and *Katarungang Pambarangay* or neighborhood or village justice system still remains vibrant in Filipino's life. In contrast with facilitative approach, where a third-party merely plays the role of a facilitator, an authoritative role by the elders are usually observed in these dispute resolution processes . See more on Susan Aro, *"Feature: 'Tongtongan,' an indigenous conflict resolution"* (2011) <http://archives.pia.gov.ph/?m=7&r=CAR&id=34349&y=2011&mo=05>. Site accessed on 30.04.15.

[112] In Sri Lankan community mediation system, mediators are moral authorities and respected figures of the village, which is in contrast to the North American model of mediation where mediators merely plays a facilitative role. Due to their moral authority, it is expected that they might use persuasion in resolving a dispute. See moe on Nadja Alexander, "*From Communities To Corporations: The Growth of Mediation In Sri Lanka"* (2002) <http://mediate.com/articles/alexander.cfm >; See also, Peter Woodrow, "*Mediation in the Sri Lankan Context*" (2003) <http://www.beyondintractability.org/audiodisplay/woodrow-p-3-sri-lanka1>. Site accessed on 02.05.15.

interrelated," the Western cultures see their relation as separate.[113] The Asia has a rich culture in which to practise mediation in their out-of-court settings where mediators have considerable power to intervene in disputes in order to attain a fair and amicable solution. Such practice suggests an evaluative approach of mediation, in contrast to Western mediation, where the mediators follow a facilitative approach, take a non-interventionist role and focus on interests rather than rights. The interventionist and legally informed role of mediators in the Asia contributes more on rights/positions of the parties, rather than on their interests. Since the social and cultural context of Asia is more *"widely diverse"* than Western liberal democratic countries,[114] approaches and critiques relevant to Western societies may not be applicable in Asian societies. Thus, an unsuitable transfer of knowledge and ideas without considering the context could lead to cultural imperialism. Such cultural imperialism may involve *"the use of economic and political power to exalt and spread the values and habits of a foreign culture at the expense of a native culture"*.[115] If action is taken on the basis of research and critique from one culture into another, it may fail to achieve positive change in that society.[116] For example, LeResche[117] observed that Korean Americans with Asian heritage follow a process of dispute resolution that is very different from the American *'problem-solving style'* in terms of their starting assumption and process dynamics.[118] Therefore, the contextual and cultural differences are considered carefully while discussing other traits of mediation. Considering the *'high-context culture'* propounded by Boulle,[119] which Hofstede[120] describes as *'high-power distant culture'* of Asia, it can be reasonably concluded that evaluative mediation with more interventionist role from mediators would be more culturally resonant and apposite mediation approach to be applied in Asian countries having similar cultural root.

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113 A. Taylor, n 6, p. 99.

114 A. Taylor, n 6,p. 257.

115 Bullock and Stally brass cited in, J. Tomlinson, *Cultural Imperialism: A Critical Introduction,* Continuum, London, p. 3.

116 J. Tomlinson, n 56.

117 Diane LeResche, "Comparison of the American Mediation Process with a Korean-American Harmony Restoration process", *Mediation Quarterly.* Vol. 9, no. 4, pp. 323-39.

118 Diane LeResche,n 116; cited Taylor, n 6. Pp. 258-59.

119 L. Boulle, n 26.

120 G. Hofstede, n 37.